MOTION FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion of Charles J. Meyers for Leave to File Brief Amicus Curiae and Amicus Curiae Brief

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Pursuant to Rule 42(3) of the Rules of this Court, Charles J. Meyers respectfully moves the Court for leave to file the attached brief *amicus curiae* in the above entitled case. The petitioners have granted their consent for the filing; the letter granting such consent is attached hereto as Appendix A. The respondent has not granted its con-

sent, but has indicated that it will not object to this motion; the letter stating the position of the respondent is attached hereto as Appendix B.

The petition for a writ of certiorari was granted on December 5, 1977. Under Rule 41(1) of the Rules of this Court, the petitioners' brief was accordingly due no later than January 19, 1978. Although that brief has now been filed, this motion is timely under Rule 42(3) since it and the accompanying brief *amicus curiae* are "presented within the time allowed for the filing of the brief of the party supported."

INTEREST OF THE AMICUS

Amicus is Professor of Law and Dean of the Stanford Law School. For twenty years, since he was law clerk for the Special Master in *Arizona v. California*, 373 U.S. 546 (1963), about one-half of his professional career has been devoted to water law. He is the author or co-author of numerous works on that subject, including a 127-page article entitled "The Colorado River," 19 Stan. L. Rev. 1-75, 367-419 (1966), which at pages 58-65 discusses the interpretation of Section 8 of the Reclamation Act of 1902, the principal issue in the case now before the Court. He is co-author of Meyers and Tarlock, *Water Resources Management* (1971) which treats the same issues at pages 501-510. Finally, he was Associate Counsel of the National Water Commission and had the primary responsibility for drafting Chapters 13 and 14 of the Final Report, *Water Policies for the Future* (1973), which chapters deal with federal-state relations in water resource development.

Amicus has no client in this case and has refused offers of employment from would-be clients. His interest as an academic lawyer is to advise the Court of what is perceived to be errors in the interpretation of Section 8 of the 1902

Reclamation Law to the end of improving the law, removing conflicts between federal and state governments in the construction and operation of water development projects and delineating the proper roles of the two levels of government in this strife-ridden area of resource management. The *amicus* thus stands in the historical tradition of "an essentially professional relation" to the Court rather than advocating a particular client's interest as *amicus curiae*. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy," 72 Yale L. J. 694, 703 (1963).

CONCLUSION

For each of the foregoing reasons, the motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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STATE OF CALIFORNIA, et al.,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief Amicus Curiae of Charles J. Meyers

SUMMARY OF ARGUMENT

This case involves the construction and application of Section 8 of the 1902 Reclamation Law, 32 Stat. 388 (1902), as amended 43 U.S.C. §§ 371 *et seq.* (1970). It is time to reaffirm the correct interpretation of this provision.

It is the contention of *amicus* that in constructing a water project pursuant to the reclamation laws, the Secretary of

the Interior is presumptively bound by Section 8 to "proceed in conformity with" state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." (The full text of Section 8 is in the Appendix.) The presumption may be overridden by a provision in a reclamation law which either explicitly or implicitly states a federal objective that would be frustrated by conforming to state law.

Amicus believes that three important cases contain language contrary to the express mandate of Section 8, thereby causing confusion and conflict in the management of water resources. They are *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958); *City of Fresno v. California,* 372 U.S. 627 (1963); *Arizona v. California,* 373 U.S. 546 (1963). These cases erroneously interpret Section 8 as placing no constraints on the Secretary; on the contrary, they construe Section 8 as invoking state law solely for the purpose of defining property rights entitled to compensation under the Fifth Amendment when taken in the construction or operation of a reclamation project. All three cases were relied on by the District Court in this case; they were also relied on by the Court of Appeals, in that it stated that the District Court's judgment should be affirmed "substantially for the reasons stated by Judge MacBride in his opinion."

ARGUMENT

I. PRIOR TO IVANHOE, CITY OF FRESNO AND ARIZONA V. CALIFORNIA, THE SECRETARY WAS REQUIRED TO CONFORM TO STATE LAW IN OPERATING RECLAMATION PROJECTS, AND THE SECRETARY UNIFORMLY COMPLIED WITH THE LAW IN PRACTICE.

The law, and the practice of the Secretary, from 1902 onward is described in *Nebraska v. Wyoming,* 325 U.S. 589 (1945). In an equitable apportionment case in the original jurisdiction of this Court, the United States claimed for two

reclamation projects water rights free from state control. The Court rejected the claim in an opinion by Mr. Justice Douglas (325 U.S. at 613-15):

> "Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects. There were also applications to the States for permits to construct canals and ditches. They described the land to be served. The orders granting the applications fixed the time for completion of the canal, for application of the water to the land, and for proof of appropriation. Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation districts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted that proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners. They designated the number of acres included, the use for which the appropriation was made, the amount of the appropriation, and the priority date. The contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials.
>
> "All of these steps make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes v. Fox, supra,* pp. 94-95: 'Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use

> of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr,* 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water *(ibid.),* with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.'
>
> "The property right in the water rights is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. See *Murphy v. Kerr,* 296 F. 536, 542, 544, 545: *Commonwealth Power Co. v. State Board,* 94 Neb. 613, 143 N.W. 937; *Kersenbrock v. Boyes,* 95 Neb. 407, 145 N.W. 837. Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'
>
> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction. . . ."

In the succeeding paragraph, Justice Douglas deals with the contention of the United States that its management of federal projects would be jeopardized unless its claims, free of Section 8 constraints, were recognized. He isolates the issue exactly: "We do not suggest that where Congress has

provided a system of regulation for federal projects it must give way before an inconsistent state system." 325 U.S. at 615. That is the proper focus of inquiry: do other provisions of a reclamation act reflect an intent to modify the directive of Section 8? If so, of course the modification stands. If not, Section 8 remains in full force and state law applies.

II. IVANHOE, CITY OF FRESNO AND ARIZONA V. CALIFORNIA INCORRECTLY AND UNNECESSARILY DEPART FROM THE PRIOR LAW AND PRACTICE.

The first departure from the law and practice set forth in *Wyoming v. Nebraska* known to *amicus* is found in *Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275 (1958), where the Court said (at p. 291-2): "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein."

This language was wholly unnecessary to the decision, for the issue, as the Court fully understood, was whether Section 8 could be construed to override Section 5 of the same 1902 Reclamation Law. The Supreme Court of California had been persuaded to declare that the law of California forbade restrictions on irrigation water deliveries based on the size of the farm. (47 C.2d 597 at 637.) The California Court then proceeded to hold that since Section 8 required conformity to state law, the Secretary was required to deliver reclamation water to excess lands in California in defiance of the express provision of Section 5, which limits water deliveries to 160-acre farms. The California Court's decision was preposterous: it is inconceivable that Congress intended Section 8 to overrule a provision of the 1902 law that embodied a land tenure policy of the

nation dating back to Thomas Jefferson and carried forward in such laws as the 1862 Homestead Act under which most of the Midwest and West was settled. The denigration of Section 8 in *Ivanhoe* could easily have been an outraged response to the attempt to use the section to secure for large landowners in California an exemption from a policy embedded in history, explicit in the law, and ratified in the political fights that denied to California any exemption from the 160-acre limitation.

Ivanhoe was an easy case that made good law but a bad *dictum.* The repetition of that *dictum* in two subsequent cases should not obscure its doubtful origin.

City of Fresno v. California, 372 U.S. 627 (1963), relies on the *Ivanhoe dictum* to support an apparent holding which drastically confines the operation of Section 8. (We say "an apparent holding" because the rationale of the decision is unclear, as will be explained presently.)

In the massive and bitter Friant Dam litigation [*Dugan v. Rank,* 372 U.S. 609 (1963)], the City of Fresno intervened, seeking declaratory relief on four claims: (1) rights to ground water, (2) statutory priority, under California law, for muncipal and domestic use, (3) entitlement to water at the same (lower) price charged to irrigators and (4) prior rights to water under the California area-of-origin law. This Court rejected all four claims. As to the first, the Court properly held that if Fresno's groundwater had been taken, the appropriate relief was under the Tucker Act. Fresno's second and third claims smacked of the overreaching in *Ivanhoe*: both were made in the face of explicit statutory provisions preferring irrigation use over domestic and municipal use. The governing statute, Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1194, as amended, 43 U.S.C. § 485h (c), specifically provided that

no contract should be made for municipal water unless the Secretary determined that irrigation project efficiency would not be impaired. Similarly, the same section authorized the Secretary to charge more for municipal water than for irrigation water. Fresno sought to avoid these statutory mandates through the *Ivanhoe* device of finding state law contrary to the mandate and then claiming that Section 8 overrode the mandate. The effort quite properly failed.

But the area-of-origin laws of the State of California presented a different question. They do not create a property right compensable under the Tucker Act. Instead they establish a state regulatory scheme for the allocation of water. True, this state regulatory scheme could be overridden by federal law—and perhaps it was by the same Section 9(c) that overrode the state law preference for municipal use over irrigation use, or by some other provision of the Friant Dam legislation. But such was not the ground for decision. The Court relied instead on the *Ivanhoe dictum* to nullify Section 8 and thereby pretermit an inquiry into conflict between federal objectives and state objectives. The Court said (372 U.S. at 629-30):

> Petitioner seems to say that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses. However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958). Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.

This use of *Ivanhoe* elevates an ill-considered *dictum* to apparent holding. That case does not hold that Section 8 is a compensation statute only; it holds that a specific provision of the Reclamation law forbidding delivery of water to excess lands is not overridden by a general provision of the same statute deferring to state law. What the Court appears to say in *Fresno* is: if you cannot claim that a property right has been taken away from you, you cannot claim under Section 8. But the words of Section 8—"proceed in conformity with" the "laws of any state . . . relating to the control, appropriation, use, or distribution of water" —simply will not bear that interpretation.

At the outset of this analysis of *Fresno*, some uncertainty was noted about the rationale of the case. Following immediately after the language quoted above, the Court goes on to say, in essence: in any event, California law (citing no authority) does not give Fresno the area-of-origin protection it claims, anyway. 372 U.S. at 630. But whether the quoted language was necessary to the decision or not, the Court should disavow it in this case.

The third of the tragic trilogy, *Arizona v. California*, 373 U.S. 546 (1963), relies on the *dictum* in *Ivanhoe* and the ambiguous decision in *Fresno* to hold that Section 8 has no influence on the intrastate distribution of Boulder Canyon Project water. It is, of course, clear that Section 8 (which was incorporated in the Project Act as Section 14 and was substantially restated in Section 18) is inapplicable to the interstate allocation of Colorado River water. But the Court, in a five to three decision, went further to declare (373 U.S. at 586-7): "The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irr. Dist. v. Mc-*

Cracken, . . . and reaffirmed in *City of Fresno v. California*. . . ." The majority then quotes the misbegotten *Ivanhoe dictum* that § 8 merely requires the United States to comply with state law when it condemns water rights. The majority then concludes with this *non sequitur*: "Since Section 8 . . . did not subject the Secretary to state law in disposing of water in that case [the *Ivanhoe* case], we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act." (373 U.S. at 587.)

A decision that Section 8 of the Reclamation law was not intended to repeal Section 5 of the same law hardly decides the question of the relationship of federal and state law in the local distribution of project water. From an easy case that made good law—namely that Californians could not evade the 160-acre limitation by concocting a spurious state law that somehow overruled the specific mandate of Section 5 of the 1902 Reclamation law—this Court has pushed the *dictum* of *Ivanhoe* to the point that Section 8 has no meaning at all. It is time to purge the error and restore some balance in state-federal relations in the management of water resources.

The Court should *not* deny the State of California's claims on the linguistically impermissible ground that Section 8 provides for compensation of property rights only; the Court should *not* hold that a state's regulatory scheme is beyond the protection of Section 8. Instead the Court should perform the admittedly harder but intellectually more honest task of determining whether the Congressional purposes in authorizing the construction and operation of the New Melones Project are frustrated to the extent that, in this case, the Section 8 presumption in favor of state law has been rebutted.

III. A REVIVIFICATION OF SECTION 8 WOULD ALLOW STATE WATER OFFICIALS TO ADMINISTER WATER MORE EFFICIENTLY AND WOULD NOT IMPAIR FEDERAL CONTROL OF FEDERAL PROJECTS.

One of the unfortunate results of the evisceration of Section 8 is to curtail the ability of state water officials to administer water resources efficiently. For example, *amicus* is informed that requests have been received to transfer, inside California, portions of California's allotment of Colorado River water from an existing use to a higher-value use. But uncertainty exists whether that economically efficient reallocation is legally possible. *Arizona v. California* says that federal law controls the transfer. But of course there is no federal law on water transfers; the law is purely state law, almost universally statutory. The buyer and the seller are nonetheless, and understandably, reluctant to incur the high engineering and legal costs to effect the transfer according to state procedures, since the validity of the transfer could be challenged later as beyond the power of the state. A proper interpretation of Section 8 would confer jurisdiction on state authorities to authorize transfers subject to the condition that the Secretary receive notice of the transfer proceeding to allow him to intervene in order to protect federal interests. Any claim that federal interests were jeopardized by the state proceeding could be vindicated by this Court. An exact parallel exists between the protection of federal rights jeopardized by improper interpretations of Section 8 in state proceedings and the protection afforded federal reserved rights in state adjudications by the *Eagle County* case. *United States v. District Court*, 401 U.S. 520 (1971).

Uncertainty also exists about the power of state regulatory officials to impose conservation measures on farmers receiving reclamation project water. If Section 8 merely

allows state law to define compensable property rights in water and if federal law controls project water down to the farmers' furrows, the state may be powerless to require spray irrigation in place of field flooding, to limit the amount of water that can be applied to crops, and to take other actions to save water. The consequence is that a state may be forced to construct additional dams and storage reservoirs to develop new water supplies because it lacks the regulatory power to meet the demand by conserving existing supplies.

None of these misfortunes need occur if the Court will take this occasion to reconsider its pronouncements on Section 8 and return to the historical meaning and the contemporary good sense of the language on its face: "The Secretary . . . shall proceed in conformity with . . . [state] laws relating to the control, appropriation, use, or distribution of water used in irrigation. . . ." —except where state law conflicts with the acomplishment of federal purposes. Conflict should be the issue—not the meaning of Section 8.

CONCLUSION

The general issue properly before the Court is whether the application of state law pursuant to Section 8 frustrates a federal purpose. The specific question is whether the conditions of Decision 1422 are in such conflict with the statutory provisions which authorized construction of the New Melones Project that it is necessary to override state law and Section 8 in order to accomplish the Congressional purpose. If this question is regarded as one of law only, as it was below, the Court can affirm or reverse the summary judgment granted below. If the Court considers that the issue of conflict between federal purposes and the state conditions raises questions of fact, the Court should remand

the case for trial. What the Court should *not* do is to hold that Section 8 is a compensation statute only, making no allowance for application of state law to federal reclamation projects.

Respectfully submitted,

CHARLES J. MEYERS
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(Appendices follow)

Appendix A

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE [LETTERHEAD]
STATE BUILDING, SAN FRANCISCO 94102
(415) 557-2544
(415) 557-3920

January 10, 1978

Michael Rodak, Jr. Clerk
United States Supreme Court
Washington, D.C. 20543

Re: State of California v. United States
No. 77/285.

Dear Mr. Rodak:

The petitioner, State of California, et al, consents to the filing of the amicus brief of Charles J. Meyers.

Yours very truly,

EVELLE J. YOUNGER
Attorney General

/s/ RODERICK E. WALSTON
Roderick E. Walston
Deputy Attorney General

REW/elb

Appendix B

Office of the Solicitor General [Letterhead]
Washington, D.C. 20530

January 5, 1978

Dean Charles J. Meyers
Stanford Law School
Stanford, California 94305

Re: *California v. United States,* No. 77-285,
Supreme Court, October 1977 Term,
certiorari granted December 5, 1977.

Dear Dean Meyers:

This is in response to your request, made by telephone to this office on January 4, 1978, that the United States consent to your filing of a brief *amicus curiae* in the above-cited case.

As I understand it, you propose to file the brief solely on your own behalf, as a scholar in the field of water law who has written extensively on the subject involved in this case and who has an academic and professional interest in the optimum development of the law in this field.

Let me stress that, knowing your reputation and the major scholarly contributions you have made to this subject, I do not question that your proposed *amicus* brief would be of assistance to the Court. If your request were the only one of this kind that could be foreseen, I would not hesitate to grant my consent.

I must, however, decline to do so. Once this office changed its policy to consent to *amicus* filings by persons whose interest in a case was solely academic, it is not clear where we could stop. If we consented automatically to all such

requests, we would abdicate the screening function that the Supreme Court's Rule 42(2) imposes on us, we believe, as a litigant who is frequently asked to consent to *amicus* filings in the Court. But short of that extreme position, we see no feasible and defensible way to distinguish between the "scholarly" requests to which we would consent and those to which we would not. We cannot draw lines on the basis of institutional affiliation, or our own perceptions of a law professor's reputation, or even whether one is a law professor (as distinguished, for example, from a practitioner, a political science professor, or perhaps even a law student), or on the basis of the quality or even the existence of published writings by the applicant relevant to the case in question. In short, we are faced with the problem, well known to law professors, of a "slippery slope."

Perhaps we are being too protective of the Court. But we do read Rule 42(2) as obliging us to screen *amicus* requests and to do so in a rational and even-handed manner. Would-be *amici* who are denied the consent of all parties under Rule 42(2) remain free, of course, to move the Court for leave to file pursuant to Rule 42(3), which requires that the movant set forth, among other things, the nature of his interest in the case. If you make such a motion, we will not object to it. (You may, of course, attach this letter to your motion.)

We welcome instruction from the Court, through its sustained action on such motions, concerning any change it may wish us to make in the standards we apply to *amicus* requests.

Alternatively, if you should seek to file an *amicus* brief in this case on behalf of a client, we would be happy to

reconsider whether to consent to your filing, in the light of the identity of the client and the nature of the client's interest in the case.

I regret that I cannot be more receptive to your request, but I trust that you understand the reasons for our position.

Sincerely,

/s/ WADE H. MCCREE, JR.
Wade H. McCree, Jr.
Solicitor General

Appendix C

Section 8 of the Reclamation Act of 1902:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (1902); 43 U.S.C. §§ 372, 383 (1970).